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**IN THE  
SUPREME COURT OF MISSOURI**

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**No. SC86725**

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**ROSE COFFEE COMPANY,**

**Respondent,**

**v.**

**DIRECTOR OF REVENUE**

**Appellant.**

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**Appeal from the Administrative Hearing Commission  
The Honorable June Striegel Doughty, Commissioner**

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**Appellant-s Reply Brief**

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## **Table of Authorities**

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## Argument

If any statute was drafted in ~~Abelt~~ and ~~suspenders~~@ fashion, to borrow Rose=s phrasing,<sup>1</sup> it is the lease tax statute, ' 144.020.1(8), RSMo. It establishes generally:

\$ when a lease is taxed, and

\$ when the purchase of an item to be leased is taxed.

It establishes specifically:

\$ when the lease of motor vehicles, trailers, boats, and outboard motors is taxed, and

\$ when the purchase of motor vehicles, trailers, boats, and outboard motors to be leased are taxed.

And it establishes finally:

\$ when exemptions apply.

As for ' 144.020.1(8)=s application to leases in general, the statute imposes a tax on lease receipts,

provided that if the lessor or renter of any tangible personal property had previously purchased the property under the conditions of ~~A~~sale at retail@as defined in subdivision (8) of section 144.010 and the tax was collected at the time of purchase, the lessor or renter shall not

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<sup>1</sup> Respondent=s Brief, pp. 12-13.

apply or collect the tax on the subsequent lease or rental receipts from that property.

That is the two-option framework that the Director discussed in her opening brief: The purchaser pays up front on its purchase of the item, or collects tax from its customers on the lease receipts.

But the legislature did not stop there. In ' 144.020.1(8) the legislature specifically addressed taxability of the lease of motor vehicles, trailers, boats, and outboard motors, and the purchase of such items to be leased, reinforcing the tax treatment of such transactions by including explicit reference to ' 144.070<sup>2</sup> and ' 144.440<sup>3</sup>, which also address their taxability.

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<sup>2</sup> Section 144.070 is titled, **A**Purchase or lease of motor vehicles, trailers, boats and outboard motors, tax on **B** *option granted lessor* **B** application to act as leasing company.@ [Emphasis added.]

<sup>3</sup> Section 144.440 is titled, **A**Use tax on purchased or leased motor vehicles,

The legislature did not stop there, either. Section ' 144.020.1(8) concludes with a sentence that addresses when B and which B exemptions apply:

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trailers, boats and outboard motors B *option of lessor*, effect of.@[Emphasis added.]

Tangible personal property which is exempt from the *sales or use tax* under section 144.030<sup>4</sup> upon a sale thereof is likewise exempt from the *sales or use tax* upon the lease or rental thereof. [emphasis added]

The legislature's inclusion of a reference to *sales or use tax* in ' 144.020.1(8) was not only within its legislative prerogative, but abundantly logical, inasmuch as ' 144.615 B covering use tax exemptions B specifically incorporates ' 144.030, when it exempts from the use tax

Tangible personal property, the sale or other transfer of which, if made in this state, would be exempt from or not subject to the Missouri sales tax pursuant to the provisions of subsection 2 of section 144.030.

' 144.615(3).

In short, the concluding sentence of ' 144.020.1(8) provides B for purposes of *sales or use tax* B when and which exemptions apply to lease transactions, i.e., those contained in ' 144.030. Notably, ' 144.030 does not contain an exemption for resale, and ' 144.020.1(8) provides none elsewhere.<sup>5</sup>

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<sup>4</sup> Rose misquotes this portion of the statute in its brief, at p. 23, by omitting the phrase *under section 144.030.*

<sup>5</sup> The legislature provided an exemption from use tax for resale, in

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' 144.615(6), but the legislature did not choose to import it into ' 144.020.1(8).

This Court in *Six Flags Theme Parks, Inc. v. Director of Revenue*, 102 S.W.2d 526, 529-530 (Mo. banc 2003), held that where the issue is taxability of fees charged for rental of an item, ' 144.020.1(8) Agoverns such a transaction.@ As discussed in the Director=s opening brief, at pp. 22-23, the Court concluded that because the owner of the machines paid sales or use tax on their purchase (option one), taxation of receipts from rentals of those machines (option two) Awas prohibited.@ *Id.* at 529.

Against that explicit backdrop, the faultiness of Rose=s argument is laid bare. Rose does not dispute the Director=s argument that its transfers of the equipment were leases or loans. Respondent=s Brief, p. 18 n.7. Rose=s overarching argument is that regardless of whether the items were leased, if it purchased the items for Aresale,@then the resale exemption or exclusion applies to that purchase B that is, the lease tax statute simply does not matter. *E.g.* Respondent=s Brief, pp. 11, 16, 18, and 25.

The argument contradicts *Six Flags*, in which this Court held that the lease tax statute Agoverns such a transaction.@ *Id.* at 529-530.<sup>6</sup>

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<sup>6</sup> Rose frequently mentions, and attempts to differentiate between, a resale exclusion found in ' 144.010.1(10), and a resale exemption found in ' 144.615(6). Respondent=s Brief, pp. 13 n.5, 16, 19, 20, 21, and 26. Because the lease tax statute governs the transaction here, the distinction is of no moment. If it were relevant, the distinction makes no difference. While the Court was not asked in *Kansas City Power and Light v. Director of Revenue*, 83 S.W.3d 548, 551 (Mo. banc 2002), to draw the fine

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line between exemption and exclusion for resale that Rose urges here, the Court B in describing the resale provisions in ' 144.010.1(10) and ' 144.605(7) B stated that they Aprovide for an exemption from sales tax[.]@AThe resale exemption is analyzed similarly under both the use tax and sales tax schemes.@*Id* at 552 (citing *House of Lloyd, Inc. v. Director of Revenue*, 884 S.W.2d 271, 274 (Mo. banc 1994)).

The argument also contradicts this Court's line of cases beginning with *Int'l Business Machine Corp. v. State Tax Comm'n*, 362 S.W.2d 635, 639 (Mo. 1962) and *Federhofer, Inc. v. Morris*, 364 S.W.2d 524, 528 (Mo. 1963), in which this Court held that lease transactions were not sales at retail.<sup>7</sup> The legislature responded to the decisions in 1963, not by changing the definition of sale at retail, but by enacting the lease tax statute, § 144.020.1(8), imposing tax on a new service, leases. 1963 Mo. Laws 196.

The *IBM* and *Federhofer* cases to which Rose makes little more than passing reference, Respondents' Brief, p. 23 B remain good law on this point. Instead of confronting *IBM* and *Federhofer*, Rose makes much in its brief of *Weather Guard Inc. v. Director of Revenue*, 6 S.W.3d 588 (Mo. App. 1988), and *Brambles v. Director of Revenue*, 981 S.W.2d 568 (Mo. banc 1998), but those cases do not carry its argument.

*Weather Guard* involved a wholesaler that purchased insulation machines out-of-state, and on which it paid use tax. 6 S.W.3d at 657. The wholesaler loaned the machines to a retailer, who sold home insulation kits to customers. *Id.* The customers could use the machines if they paid extra. *Id.* The wholesaler was entitled to a refund,

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<sup>7</sup> The Director discussed this line of cases in detail in her opening brief, pp. 29-33.

the court held, because the rental qualified as a sale under ' 144.605(5). *Id.* at 658. The *Weather Guard* court never addressed the lease tax statute.

And ten years later, this Court in *Brambles* did not mention *Weather Guard*. In *Brambles*, the taxpayer leased pallets to P&G, which in turn transferred the pallets to its own customers. *Id.* at 571. The Court noted that to the degree that a lease could be a sale for resale if an outright sale had been made, section 144.010(3) requires that the proceeds from such a lease be excluded from gross receipts. *Id.* at 570. Well enough. But the reason that the Court identified for the tax payer prevailing on its refund claim, for taxes paid on its original purchase of the pallets, was that the taxpayer had adduced sufficient evidence to establish a prima facie case that it [was] entitled to the *packaging exclusion* described in *Sipco [Inc v. Director of Revenue, 875 S.W.2d 539 (Mo. banc 1994).]* *Id.* at 571 (emphasis added). The Court could not address the lease tax statute because there was no evidence before the Commission inconsistent with the taxpayer's theory, *id.*, such as the lease.

Even if *Brambles* did apply here, which it does not, it favors the Director's position. Rose argues that the key to the *Brambles* decision is that a lease which would qualify as a sale for resale if an outright sale had been made is not subject to tax. Respondents' Brief, p. 14. As discussed above, in *Brambles*, the taxpayer leased the items to another entity, P&G, which in turn conveyed the items to its own customers. But here, Rose leased equipment to its customers who under the terms of the lease could

not convey the equipment to anyone else. The contracts between Rose and its customers explicitly provided that the customers could not sell, or otherwise lose possession of, Rose's equipment. LF 9. If *Brambles* applied, it would support the Director's position.

Rose also argues that the lease tax statute cannot apply because Rose purchased its items out of state, and the lease tax statute is a sales tax statute. Respondent's Brief, p. 17. The argument is hard to follow. For obvious reasons, the legislature has not sought to tax a *lease* that occurs out-of-state. But insofar as the *items to be leased* go, the statute does explicitly cover purchases made subject to *A*sales or use tax<sup>@</sup> and the taxability of the lease of such items. ' 144.020.1(8).<sup>8</sup>

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<sup>8</sup> While Rose's argument is legally wrong, which is dispositive, it is also somewhat misleading on the facts. Rose says that *A*the purchases at issue herein are from out-of-state vendors[.]<sup>@</sup> Respondent's Brief, p. 17. But Rose's evidence was that it purchased coffee equipment *A*from vendors located both inside and outside of Missouri.<sup>@</sup> LF 71, & 3 .

Finally, Rose argues that its interpretation avoids multiple taxation. *E.g.* Respondent's Brief, pp. 12, 15, and 21. Its interpretation actually avoids *any* taxation B on about 53% of its sales. The record reflects that Rose accepted exemption certificates from half of its customers. LF 75, &12.<sup>9</sup> If Rose's theory carries the day, then no tax was ever collected on most of the coffee equipment that Rose claims to have Aresold@to its customers, and Rose will be refunded the tax that it paid on the purchase of that coffee equipment.

Rose seemingly grasps that problem, because it carefully argues that the cost of the coffee equipment is Abundled@together with the cost of the coffee. Respondent's Brief, pp. 11, 18 n.7, 24, and 30. Plainly, the reason that Rose's customers gave Rose the exemption certificates was because Rose's customers were reselling the *coffee*, not the coffee equipment. Again, the evidence showed that they could not, because of the loan agreements. LF 9. With respect to lease transaction for which Rose was *not* provided exemption certificates, and on which it *did* collect tax, Rose could apply for a

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<sup>9</sup> Rose quarrels with the Director's description of these certificates as Aresale@ exemption certificates, arguing that the record does not show what kind of certificates they were. Respondent's Brief, pp. 15 n.6. But the record reflected that they were just that: Rose submitted an affidavit to the Commission, explaining that its customers who make claims of exemption are typically customers that brew and sell liquid coffee and tea, and collect Missouri and local sales tax on such sales. LF 75, &14.

refund of the tax attributable to the coffee equipment, because it chose option one (to pay tax on its purchases of the equipment). But Rose has not made that claim here.

Rose is not entitled a refund because it did not remit the tax at issue in error.

' 144.190.2. Rose correctly remitted the tax, in accordance with ' 144.020.1(8).

## **Conclusion**

The Administrative Hearing Commission's decision, granting Rose's request for a refund of use tax paid on coffee equipment and parts, should be reversed.

Respectfully submitted,

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## Certification of Service and of Compliance with Rule 84.06(b) and (c)

The undersigned hereby certifies that on this 24<sup>th</sup> day of October, 2005 one true and correct copy of the foregoing brief, and one disk containing the foregoing brief, were mailed, postage prepaid, to:

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b), and that the brief contains 2,330 words.

The undersigned further certifies that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses and is virus-free.

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Deputy Solicitor